84-1540

Office - Supreme Court, U.S.
FILED
MAR 27 1984
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK DUCKWORTH,
Warden, Indiana State Prison

Petitioner,

-vs-

RICHARD W. DILLON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINLEY E. PEARSON
Attorney General of Indiana

DAVID A. ARTHUR
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone (317) 232-6332

Attorneys for Petitioner

Central Publishing Company, Inc., Indianapolis, IN 46206

78PP

QUESTION PRESENTED FOR REVIEW

Whether a confessed multiple murderer is denied effective assistance of counsel within the meaning of the Sixth Amendment and warranting habeas corpus relief where the counsel errors cited by the Circuit Court do not go to the admissibility of the confession.

TABLE OF CONTENTS

	Page:
Question Presented for Review	i
Table of Authorities	iii
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
A. Nature of the Case	3
B. Course of Proceedings	3
C. Facts Material to the Consideration of the Question Presented	4
Reasons for Granting the Writ:	
WHETHER A CONFESSED MULTIPLE MURDERED IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WITHIN THE MEANING OF THE SIXTH AMENDMENT AND WARRANTING HABEAS CORPUS RELIEF WHERE THE COUNSEL ERRORS CITED BY THE CIRCUIT COURT DO NOT GO TO THE ADMISSIBILITY OF THE CONFESSION	7
Conclusion	14

TABLE OF AUTHORITIES

Cases: *Pages:*

Dillon v. State, 454 N.E.2d 845 (Ind. 1983), *cert. denied* 462 U.S. ___, 104 S.Ct. 1617, 80 L.Ed.2d 145 (1984) 2, 7

In re Fulcher, 464 Ind. 327 (Ind. 1984) 10

Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610 (1983) . 9

Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984) 7, 8, 9, 10, 11, 12, 13, 14

United States v. Cronic, ___ U.S. ___, 104 S.Ct. 2039 (1984) 7, 8, 10, 11, 13

Statutes:

28 U.S.C. §1254 2

28 U.S.C. §2101(c) 2

28 U.S.C. §2254 3

Rules:

Rule 17, Rules of the Supreme Court of the United States 2

Rule 20.2, Rules of the Supreme Court of the United States 2

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK DUCKWORTH,
Warden, Indiana State Prison

Petitioner,

-vs-

RICHARD W. DILLON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Jack R. Duckworth, Warden, Indiana State Prison respectfully prays this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) entered in cause number 84-2208 on December 28, 1984, which reversed the judgment of the United States District Court for the Southern District of Indiana, Evansville Division (hereafter District Court), the Seventh Circuit thereby granting relief by way of habeas corpus to a person in custody pursuant to a conviction before an Indiana State court.

Petitioner is the Superintendent (formerly "Warden") of

the Indiana State Prison, Michigan City, Indiana, and is the person having custody of the Respondent. The real party in interest in this habeas corpus action is the State of Indiana, through its Attorney General.

Respondent is Richard W. Dillon, a prisoner in the custody of Petitioner by reason of a conviction before the Knox County, Indiana Superior Court for the crimes of two (2) counts of murder, burglary, and conspiracy, for which convictions the Respondent was sentenced to the death penalty.

OPINIONS BELOW

The decision of the Seventh Circuit issued on December 28, 1984, is reported at ____ F.2d ____ (7th Cir. 1984). The opinion is set out in the appendix to this petition, beginning at page A-1, with an Order amending the opinion beginning at page A-16. The decision of the District Court, entered on June 21, 1984, is unreported, and is set out in the appendix to this petition beginning at page A-18.

The decision of the Supreme Court of Indiana affirming the conviction and sentence was entered on the 3rd day of October, 1983, and is reported at *Dillon v. State*, 454 N.E.2d 845 (Ind. 1983), *cert. denied* 462 U.S. ____, 104 S.Ct. 1617, 80 L.Ed.2d 145 (1984). This opinion is set out in the appendix to this petition beginning at page A-32.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 and Rule 17 of the Rules of this Court.

The decision of the Seventh Circuit was entered on December 28, 1984. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> Section 1. ... No State shall ... deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

A. Nature of the Case

This petition arises from the reversal of the District Court judgment, which judgment had denied relief to the Respondent in a habeas corpus action filed by a state prisoner under 28 U.S.C. § 2254.

B. Course of Proceedings

The petition for writ of habeas corpus was filed in the District Court on the 30th day of March, 1984. A stay of the scheduled execution of Respondent was requested of and granted by the District Court. Following the filing of Petitioner's return to the order to show cause why the relief sought should not be granted and of the record of proceedings from the state courts, the District Court heard oral argument on the issues of the petition. On the 21st day of June, 1984, the District Court entered its memorandum

order and judgment entry, denying relief to the Respondent on all grounds in the petition. Appendix, pp. A-18 and A-31. The stay of execution previously entered was vacated. Appendix, p. A-31.

Respondent appealed this denial of relief to the Seventh Circuit, first obtaining a further stay of execution from the District Court pending the appeal. Following the filing of briefs and the presentation of oral argument, the Seventh Circuit affirmed the judgment of the District Court as to each of the grounds raised except one, that ground concerning an alleged denial of the right to the effective assistance of counsel.

The Seventh Circuit ordered that the writ of habeas corpus would issue unless the Respondent were granted a new trial within ninety (90) days of the date of the decision.

The effect of the order granting the writ and the issuance of the mandate of the Court have been stayed pending the filing and determination of this petition.

C. Facts Material to the Consideration of the Question Presented

Respondent confessed to the brutal slaying of an elderly couple in Pike County, Indiana, during the burglary of their home, by stabbing them to death while the victims tried in vain to defend themselves from the much younger attackers. Although Respondent had, by his own admission, the opportunity to leave the scene without confronting his victims, he returned to the inside of the house and there murdered William and Mary Hilborn. Respondent did the actual stabbing that resulted in the deaths. The admissibility of the confession was not challenged in the Seventh Circuit. It was twice unsucessfully challenged before the state trial court, and again before the Supreme Court of Indiana and the District Court.

Respondent was charged with and convicted of two (2) counts of murder, burglary, and conspiracy, and by

information the State charged the statutory aggravating circumstances of (1) a knowing and intentional killing in the course of the enumerated felony of burglary and (2) committing more than one murder.

The facts of the crime, as found in Respondent's confession and corroborated by the physical evidence, are that Respondent and another planned to break into the home of an elderly couple, William and Mary Hilborn, because they had heard that the victims kept a large amount of money there. Respondent and his accomplice broke into the house with the intention of stealing that money. While they were in the home, Mr. and Mrs. Hilborn returned. Respondent and his accomplice hid; and, although they had an opportunity to leave the house without committing murder, decided it would be advisable to kill the couple to prevent them from being witnesses concerning the burglary. The killing was committed by Respondent, who stabbed each of the victims several times. Mrs. Hilborn was slashed in several places on her neck and hands, in an effort to torture her into revealing where the money was kept. The evidence showed that Mr. Hilborn struggled with Respondent and tried to defend himself with a club. He had a severe wound in the abdomen, and apparently received a fatal wound in his heart while attempting to go to the aid of his wife. Mrs. Hilborn died of a severe stab wound in the stomach and a fatal stab wound in her back. Although the victims were known to have cashed their monthly retirement checks only a few days earlier, there was no money found in the home.

The Seventh Circuit found that Respondent had been denied the effective assistance of counsel. Trial counsel himself had claimed this in the state courts. He set out in affidavits the pressures under which he had been. Appendix, pages A-33 and A-53. He stated that the incompetent representation was due to his inability to prepare adequately, and cited three personal matters as the basis for this inadequacy: his recent divorce; the injury of his brother; and, the imminent death of his father. He

alleged that he reviewed the case with Respondent for less than four hours from the time of the arrest to the trial. R. 6, 211; Appendix, pages A-33 and A-53. However, neither of the affidavits filed by the trial attorney stated wherein the representation was incompetent or what he should have done but did not do, and listed only that counsel felt that he was under stress during preparation for the trial.

The record shows the following facts as to these allegations:

A hearing was held on counsel's motion for continuance based on these factors, and Respondent was asked if he wished counsel to withdraw. Respondent answered that he was aware of the circumstances but that he did not wish the attorney to withdraw. R. 842. Counsel's wife had filed for divorce one month before counsel entered his appearance in the case, and the divorce was final eighty-nine days before trial. R. 12, 16-17. The father's illness had been long-standing, and his death did not occur until forty-seven days after trial began. R. 12.

The record shows—and the Supreme Court of Indiana found as facts—that during the trial preparation phase of this case counsel had numerous meetings to consult with the prosecuting attorney prior to trial, sought and obtained a change of venue, interviewed witnesses, subpoenaed and presented witnesses on Respondent's behalf, requested and received full discovery before trial and viewed all of the State's physical evidence, copied and read the grand jury testimony, filed an alibi notice and presented evidence on the alibi defense, filed a petition for a writ of habeas corpus attacking the admissibility of the confession, filed and argued a motion to suppress the confession, conducted extensive cross-examination, attended omnibus court hearings, reviewed the list of prospective jurors, and consulted with the co-defendant's attorney. R. 13-14. The record also shows that Respondent's trial counsel prepared and tendered to the court eleven proposed preliminary instructions, but that these were either withdrawn or

refused as covered by the court's own instructions. Counsel visited the Pike Count jail ten to fifteen times during the twenty-seven days that Respondent was confined there, and conferred with Respondent on four additional occasions in the court's jury room, for periods of forty to sixty minutes on each occasion. R. 18-19.

Respondent was convicted of all four counts; and, after a separate penalty phase hearing, the jury recommended the death penalty. The trial court found the recommendation to have been appropriate, entered its own findings as to aggravating and mitigating circumstances, and imposed the death penalty. R. 477-81; Appendix, page A-45—A-47.

Respondent pursued his direct appeal to the Indiana Supreme Court, which Court affirmed his conviction. *Dillon v. State, supra*; Appendix, page A-32.

REASONS FOR GRANTING THE WRIT

WHETHER A CONFESSED MULTIPLE MURDERER IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WITHIN THE MEANING OF THE SIXTH AMENDMENT AND WARRANTING HABEAS CORPUS RELIEF WHERE THE COUNSEL ERRORS CITED BY THE CIRCUIT COURT DO NOT GO TO THE ADMISSIBILITY OF THE CONFESSION

The Seventh Circuit has effectively ignored the standards set by this Court in *Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984), and *United States v. Cronic*, ___ U.S. ___, 104 S.Ct. 2039 (1984). The decision of the Seventh Circuit in this case goes contrary to every holding in those cases. While acknowledging the decisions of this Court, the Seventh Circuit has totally ignored them in this case. Therefore, this Court should grant the writ of certiorari sought herein to correct this manifest error. This failure or refusal to follow the clear and controlling holdings of this Court cannot be allowed to go uncorrected.

Many of the facts of the instant case are identical to those in *Strickland* and *Cronic*, as seen both in the decision of the Seventh Circuit as to which review is sought and in the

further facts found in the record and appearing in the statement of the case, *supra*, and in the argument, *infra*. The results, however, are diametrically opposed. Therefore, the writ should be granted, and the decision of the Seventh Circuit ultimately reversed, for the reason that a failure to follow controlling decisions of this Court when no distinguishing facts are present is so clear a deviation from the normal course of judicial proceedings that it cannot be countenanced on any conceivable basis.

The Seventh Circuit relied upon five factors shown in the affidavits (both those of defense counsel and that of the prosecutor). Those five are: lack of experience; a motion for a continuance; personal problems of counsel; the amount of evidence and preparation that could have been pursued; and, the conduct of counsel at trial. Only the last of these five points even comes close to involving the analysis required under controlling decisions of this Court.

Experience is not a proper consideration. In *Cronic*, the trial was counsel's first jury trial and his principal practice was real estate. *Cronic, supra* 104 S.Ct. at 2050. This Court stated that the proper focus is the trial itself, not the experience of counsel. *Id.*, 104 S.Ct. at 2050. The issue is the reliability of the result. *Id.*, at 2046; *Strickland*, at ____ 104 S.Ct. at 2064. The defendant must affirmatively prove prejudice. *Strickland*, at ____, 104 S.Ct. at 2067. A mere "conceivable effect" is not a sufficient showing. *Id.* The experience of trial counsel in this case played no part in the verdict. The critical fact is the lengthy confession. Counsel made two pre-trial efforts to have the confession excluded, and was unsuccessful on each attempt. Trial counsel had two and a half years experience and had just concluded another major felony trial.[1] The appointment of additional counsel for the appeal is likewise not an indication of lack of competence, but only a recognition of specialization and an effort to provide the defendant with the best possible

[1] Contrary to the observation of the Seventh Circuit, the affiavit of the prosecutor lists that trial as an example of defense counsel's recent experience and not as his "only" courtroom experience.

counsel at all levels.[2] Therefore, the experience of counsel was incorrectly considered, had no effect upon the reliability of the trial, and was incorrectly determined and assessed by the Seventh Circuit.[3]

The motion for continuance is cited by the Seventh Circuit because it contained the first of the two affidavits of trial counsel. Contrary to the decision of the Seventh Circuit, the asserted lack of a determinable trial strategy is immaterial. The motion does not demonstrate what defenses were not pursued, what evidence was not reviewed, or wherein preparation was lacking. The denial of the continuance was not found by the Seventh Circuit to have had a proven effect on the trial. *Strickland, supra*, at ____, 104 S.Ct. at 2067; *see, Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610 (1983).

Further, it is evident that trial counsel realized the overwhelming evidence—including his client's confession—and experienced the same sense of hopelessness as counsel in *Strickland* (*id.* at ____, 104 S.Ct. at 2056) but took the tack of seeking to delay the inevitable (or hope that time would bring about a miracle) rather than face defeat so soon.

The Seventh Circuit also pointed to the statement of defense counsel in the motion that he would accept discipline. The record in this case would support no disciplinary action against trial counsel. Further, trial counsel obviously cared little about his own future, as

---

[2] Specialization is the rule rather than the exception. The ninety prosecuting attorneys in Indiana try criminal cases, but all appeals are prosecuted by the Attorney General of Indiana. The Public Defender of Indiana rarely defends criminal defendants in trials but is frequently appointed to prosecute the appeal. The trials are handled by county public defenders specializing in trial work. Such specialization in private practice is equally wide-spread.

[3] The Seventh Circuit also observed that this was trial counsel's first capital case. With only twenty-seven persons under sentence of death in Indiana at this time, it is doubted that more than two or three attorneys in this State have experience in more than one capital case.

shown by his later departure from Indiana and his disbarment in 1984 for actions in an unrelated case. *In re Fulcher*, 464 Ind. 327 (Ind. 1984).

Thus, the motion for continuance does not affirmatively prove prejudice and the decision of the Seventh Circuit is contrary to controlling decisions of this Court.

The personal problems of trial counsel, recited in each affidavit, would only be an explanation of lapses in representation and are not lapses themselves. Nowhere in the affidavits (one quoted in full in the decision of the Supreme Court of Indina, p. A-33, and the other set out in full beginning at p. A-53) is there an asserted effect of the personal problems. Every attorney has a personal life and personal concerns. While trial counsel in this case had more than his share of problems, none affected his performance at trial. The Seventh Circuit merely cited a potential impact rather than an actual prejudice. *Strickland, supra*, at ____, 104 S.Ct. at 2067.

The amount of evidence involved does not show ineffective assistance. In *Cronic*, trial counsel had only 25 days to prepare for a case that it took the Government over four and a half years to investigate and prepare and which involved thousands of documents. *Cronic, supra*, at ____, 104 S.Ct. at 2041. The amount of evidence the Government puts together is not indicative of the amount of work to be done by defense counsel. *Id.* at ____, 104 S.Ct. at 2049. With full discovery (as occurred in the instant case), the job of defense counsel is substantially done for him. Time is needed only to review defenses. Given the confession of Respondent, there was little preparation of defenses that could be done. The only defense—repudiation of the confession and presentation of a story to explain Respondent's knowledge of the facts of the murders—was presented at trial.[4] The record shows no other available

[4] While the Seventh Circuit pointed out that the notice of alibi defense was not timely filed, it fails to mention the more important fact that the Respondent's alibi (*i.e.*, that he was a lookout outside of the murder scene rather than a participant in the murders) was in fact presented at trial.

defenses.[5] Given the totality of the evidence at the trial (*Strickland, supra* at ____, 104 S.Ct. at 2069), counsel did all that he could.

The Seventh Circuit also cited to trial counsel's statement that he had failed to pursue avenues of defense. However, neither the affidavit nor the decision of the Seventh Circuit set forth the available defenses. Thus, the requisite demonstrated prejudice is totally lacking in the record. The Seventh Circuit improperly relied upon conceivable but unspecified effects rather than a finding of actual effect or prejudice, contrary to both *Cronic* and *Strickland*.

As to claimed effects at trial, no prejudice is shown. The Seventh Circuit pointed to an attempt to plead guilty during trial (with the jury out of the courtroom, and sequestered immediately after to avoid news reports of the attempted plea), the failure to plea bargain, and the choice not to present evidence at the sentencing phase of the bifurcated proceeding. The plea was rejected as not having a factual basis. R.1357. The plea is claimed to have been construed by the sentencing court as a demonstration of a lack of remorse, since the plea was in fact a denial of guilt for murder but an attempt to plead guilty as an accessory, consistent with the partial alibi defense that Respondent was merely a lookout and not a participant. The plea is a duplication of the alibi defense that was presented to the jury. Therefore, there could have been no prejudicial effect. Either Respondent committed perjury during his trial testimony (showing a lack of remorse) or he lied in his confession. The former (*i.e.*, perjury at trial) is the more likely. Thus, the attempted plea itself had no possible prejudicial impact. Ignoring the aborted plea attempt, the

---

[5] The content of discussions between counsel and Respondent does not appear in the record. Therefore, there is no evidence that Respondent provided potential defenses not pursued by counsel. Further, since the record does not show the discussions, the mere number of hours spent (four, according to the Seventh Circuit) does not demonstrate an effect on the trial. The true inquiry must be the quality rather than the quantity, and there is no evidence as to the quality.

unaffected parts of the record still show a refusal to admit guilt, accept responsibility, or show remorse. Thus, the sentence is reliable, given the totality of the evidence. *Strickland, supra* at ____, 104 S.Ct. at 2069. That this is so is shown by the findings of the trial court, quoted in full in the decision of the Supreme Court of Indiana. Appendix, p. A-45 — A-47. That Court did not cite a lack of remorse as an aggravating circumstance (and the statute does not contain such an aggravating circumstance, Appendix, p.A-55) or specifically reject a mitigating circumstance of a sense of remorse. Both the statute and the findings of the trial court are silent as to remorse. The Seventh Circuit is merely speculating. Further, the jury knew nothing of the attempted plea and yet it unanimously recommended imposition of the death penalty.[6] The Seventh Circuit neither acknowledged the evidence in the record nor considered the unaffected evidence and findings as mandated under the controlling decisions of this Court.

The second "effect" at trial cited by the Seventh Circuit was the failure to engage in plea negotiations. The State did not want to plea bargain with Respondent, as found by the District Court.[7] R.14, numbered paragraph 7; Appendix, p.

---

[6] The Seventh Circuit also misconstrues the conclusion of the trial court that Respondent's age was not a mitigating circumstance outweighing the confessed aggravating circumstances of intentionally killing in the commission of a burglary and killing more than one person. Appendix, p. A-9 n.7. In this case, the fact of multiple murders following torture to force revealing the location of money in the house shows such a depraved character that Respondent was found not to be likely to "outgrow" his murderous nature. The trial court did not, as the Seventh Circuit suggests, find that age could never be a mitigating factor, only that it was not a mitigating factor outweighing the aggravating factors in *this* case.

[7] It is interesting to note that the Seventh Circuit upheld the decision of the District Court not to hold an evidentiary hearing on the issue of the lack of a plea bargain attempt (Appendix, pp. A-12 — A-13) but held that the State failed to demonstrate that the affidavit of the prosecuting attorney to the effect that he did not want to plea bargain was to be accorded no credibility. Appendix, p. A-6. Thus, the Seventh Circuit erroneously placed the burden of proof on the State rather than on the Respondent.

A-25. There is no requirement that an attorney take futile actions.

The final area relied upon by the Seventh Circuit concerned the sentencing phase of the trial.[8] The sentencing phase of the trial consisted of incorporating the guilt-phase evidence. As was the case in *Strickland*, no character witnesses were presented for Respondent, and no other evidence was presented by either side. *Strickland*, *supra* at ____, 104 S.Ct. at 2057. Like the defendant in *Strickland*, Respondent had no prior criminal record. *Id.* This Court found no error in *Strickland* because the evidence that was shown by affidavit to be available would not have produced a different result. *Id.* at ____, 104 S.Ct. at 2059. In this case, the record does not show what evidence could have been but was not presented at the sentencing phase. Therefore, there is an insufficient (indeed, non-existent) record to support the conclusion that the conduct of the sentencing phase constituted a denial of effective representation of counsel.

The same standards and method of review apply at the sentencing phase as at the guilt phase of the trial. *Strickland, supra* at ____, 104 S.Ct. at 2064. The burden on the one seeking relief is the same. *Id.* Therefore, the absence of a prejudicial effect cited by the Seventh Circuit or present in the record constitutes a failure or refusal of the Seventh Circuit to follow controlling decisions of this Court, warranting the issuance of a writ of certiorari and, ultimately, reversal of the decision below.

Respondent received a fair trial. *Strickland, supra* at ____, 104 S.Ct. at 2064; *Cronic, supra* at ____, 104 S.Ct. at 2046.

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so

[8] Even if the Seventh Circuit were correct on this point, only the sentence and not the conviction for murder would be voided.

> undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.

Strickland, supra at ____, 104 S.Ct. at 2064.

Given Respondent's confession to a brutal multiple murder of an elderly couple to avoid arrest on a burglary, and given the fact that the Seventh Circuit did not find or even intimate that admission of that confession into evidence was error, one cannot conclude but that the result of the trial is reliable and produced a just result. Had the Seventh Circuit followed the controlling decisions of this Court, it would necessarily have found no Sixth Amendment depriviation.

A writ of certiorari should be granted to allow correction of the failure or refusal of the Seventh Circuit to follow recent and controlling decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari be granted.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

DAVID A. ARTHUR
Deputy Attorney General

Attorneys for Petitioner

Appendix

Appendix

Decision, United States Court of Appeals for the Seventh Circuit (December 28, 1984)..... A-1

Judgment, United States Court of Appeals for the Seventh Circuit (Corrected January 2, 1985)..... A-15

Order, amending Decision, United States Court of Appeals for the Seventh Circuit A-16

Order, staying issuance of mandate and of order, United States Court of Appeals for the Seventh Circuit (January 16, 1985) A-17

Memorandum Order, United States District Court (June 21, 1984) A-18

Judgment Entry, United States District Court (June 21, 1984)..... A-31

Opinion, Supreme Court of Indiana (October 3, 1983)..... A-32

Affidavit of Jimmy E. Fulcher (November 25, 1981)..... A-53

Indiana Code Section 35-50-2-9 ..... A-55

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 84-2208

RICHARD DILLON

Petitioner-Appellant,

v.

JACK DUCKWORTH, Warden, Indiana State Prison

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION.

No. 84 C 82 — Gene E. Brooks, *Judge.*

ARGUED OCTOBER 31, 1984 — DECIDED DECEMBER 28, 1984

Before CUMMINGS, *Chief Judge,* COFFEY, *Circuit Judge,* and HAYNSWORTH, *Senior Circuit Judge.**

CUMMINGS, *Chief Judge.* Defendant Richard Dillon appeals from the district court's denial of his petition for

*The Honorable CLement F. Haynsworth, Jr., Senior Circuit Judge of the United States Court of Appeals for the Fourth Circuit, is sitting by designation.

writ of habeas corpus. While we affirm that court's refusal to hold an evidentiary hearing and its finding that the state trial judge's imposition of the death sentence complied with Indiana law, we disagree with the court's conclusion that Dillon received effective assistance of counsel under the Sixth Amendment.[1] Accordingly the writ of habeas corpus must issue if there is no retrial.

I.

Dillon was convicted on July 28, 1981, by the Knox County, Indiana, Superior Court of two counts of felony murder and one count each of burglary and conspiracy. These charges stemmed from the March 8, 1981, stabbing murder of William and Mary Hilborn during a burglary. The eighteen-year-old Defendant was arrested four days later after making a lengthy written confession to Indiana state police officers, a confession that was admitted into evidence at his trial. He had no prior criminal record.

Lawyer Jimmy Fulcher represented Dillon at trial. Although Fulcher had some civil and criminal experience, that experience was limited. He had been admitted to the bar for only two and one-half years, and his only significant courtroom experience was a "major felony trial" (Tr. Vol. I at 13) that he had just completed. Fulcher's representation of Dillon occurred during a time of personal crisis for him. In February 1981 his wife of eleven years filed for divorce, a divorce that became final against his wishes on April 15, 1981 (Tr. Vol. I at 12). On April 18, 1981, his brother had a motorcycle accident that left him paralyzed (*id.* at 6; Tr. Vol. III at 633). Trial was scheduled to begin on July 13, 1981. On July 5, Fulcher's father, who had been quite ill for

[1]The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.

some time, underwent emergency heart surgery and was in the hospital in very serious condition (Tr. Vol. I at 6). This final event prompted Fulcher to file an affidavit on July 7, attesting to his own incompetence and requesting a continuance from the July13 trial date so that he could prepare adequately. The trial judge denied his request, although after the jury was selected he did delay trial until July 20 to afford Fulcher an extra weekend in which to prepare.

Dillon's trial concluded at the end of July. The trial judge, following the recommendation of the jury, sentenced Dillon to death on August 21, 1981. After exhausting all state remedies, Dillon filed a petition for writ of habeas corpus in federal district court. He requested the court to hold an evidentiary hearing on allegedly new evidence relating to his claim of ineffective assistance of counsel, a request that the district court denied. Petitioner argued (1) that he had been deprived of assistance of counsel in violation of the Sixth Amendment, (2) that he was convicted in part on evidence obtained during an illegal detention in violation of his Fourth Amendment rights, (3) that the Indiana death penalty statute was unconstitutional, and (4) that the trial court did not find beyond a reasonable doubt that elements to support the imposition of the death sentence were present. The district court denied each of these contentions. Dillon appeals the denial of the evidentiary hearing and his claims relating to assistance of counsel and the trial court's imposition of the death penalty.

II.

The Sixth Amendment guarantees criminal defendants the "Assistance of Counsel," which numerous Supreme Court cases have defined as the effective assistance of counsel. *See, e.g., United States v. Cronic*, ___ U.S. ___, 104 S.Ct. 2039, 2044. Last Term, two Supreme Court cases, *Cronic* and *Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052, clarified the relevant standards in evaluating

allegations of ineffective assistance of counsel.[2] *Strickland* governs the instant situation. In order to prevail under *Strickland*, a defendant must prove both that counsel's performance was so deficient that it fell below standards of reasonable professional performance and that this deficient performance prejudiced the defense sufficiently to deprive the defendant of a fair trial. A court's scrutiny of counsel's performance is highly deferential. *Strickland*, ___ U.S. at ___, 104 S.Ct. at 2064-2065. In analyzing the counsel provided by Jimmy Fulcher, "the question is whether there is a reasonable probability that, absent the errors, the sentencer * * * would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 2069. Nevertheless, the principles stated in *Strickland*

> do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id.

---

[2]Justice O'Connor identified three categories of cases in *Strickland*, ___ U.S. at ___, 104 S.Ct. at 2067. The first is "actual or constructive denial of the assistance of counsel altogether," *id.*, in which prejudice is so likely that it is assumed as a matter of law without inquiry into the actual facts of the individual case. *United States v. Cronic*, ___ U.S. ___, 104 S.Ct. 2039, addressed this problem. The second situation involves those cases in which counsel has an actual conflict of interest. Again, prejudice is presumed, provided "the defendant demonstrates that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance.'" *Id.*, citing *Cuyler v. Sullivan*, 446 U.S. 335, 350, 348. The final category, the one that will most often arise and that *Strickland* concerned, involves claims of actual ineffective representation.

The affidavit Fulcher filed alleging his own incompetence, a claim he reaffirmed in a second affidavit filed after the trial (Tr. Vol. I at 6-7), renders Dillon's allegation of ineffective assistance highly unusual. That an inexperienced attorney was defending Dillon, a young defendant with no prior criminal record, on very serious charges augments the significance of this affidavit. These circumstances cause us to examine Dillon's petition with care. Although Dillon was only eighteen years old and was facing trial on charges for which the State of Indiana had recommended the death penalty, the trial judge seemed more concerned with the disruption in his schedule caused by the defense's successful change of venue motion and the inconvenience a continuance would cause than in seriously evaluating the allegations of trial incompetence placed before him (Tr. Vol. III 640-641). We recognize the trial court's frustration with Fulcher's request. We also recognize that the scheduling problems trial courts face mandate that they be granted "broad discretion * * * on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 12-13 (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589). *Morris*, however, was a completely different case. In that case the defendant insisted that his attorney was unprepared despite counsel's affirmative statements that he was prepared, that he had familiarized himself with the evidence and record to date, and that he had met with the defendant several times. In the case before us, the attorney himself believed that he was incompetent to try the case on grounds that amply justified his request for delay. Nonetheless, the trial judge arbitrarily denied Fulcher's

request and so abrogated Dillon's right to effective assistance of counsel.[3]

We would not reach this conclusion if Fulcher's actions were a subterfuge to gain advantage for his client. But his statements could not have served any trial strategy. The State suggests that Fulcher wanted to force the State into a plea-bargaining situation, because the State needed to try Dillon before it tried his alleged accomplice in order to have Dillon's testimony at the latter's trial. Nowhere does the State demonstrate that its case against the accomplice was so weak that it in fact would have been forced to plea bargain. In fact, much of the physical evidence introduced against Dillon was found in the accomplice's possession or was otherwise connected primarily to him rather than to Dillon (Tr. Vol. VIII at 2005, 2007, 2021, 2032, 2036, 2038). No other evidence to support the State's contention appears

---

[3]The proper focus of course should be on the adversarial process rather than the defendant's assessment of his lawyer's preparation. *United States v. Cronic*, 104 S.Ct. at 2046 n.21, citing *Morris v. Slappy*, 461 U.S. 1. Consequently, little importance attaches to Dillon's statement that he did not want Fulcher to withdraw (Tr. Vol. IV at 841-842). What is most significant about this exchange is Fulcher's belief that it was required at all. Evidently he felt it was necessary to indicate on the record that Dillon appreciated the significance of what Fulcher had alleged in his affidavit but nevertheless desired Fulcher to continue to represent him, thereby implying a waiver of Dillon's Sixth Amendment right to counsel. If so, then the State's argument that Fulcher filed his affidavit to force the State to plea bargain does not wash. This contention relies on an extraordinary degree of client loyalty. If it were true, then one would think Fulcher would let the alleged error pass, instead of bringing it to the trial court's attention, insisting on the questioning and so possibly allowing Dillon unknowingly to waive his Sixth Amendment right to counsel. Contrary to the belief of the Indiana Supreme Court, see *Dillon v. State*, 454 N.E.2d 843 [*sic*], 847 (Ind. 1983), the judge did not question Dillon, and nothing in the record suggests that the judge believed such questioning to be necessary (Tr. Vol. IV at 841-842). The questioning does indicate a very conscientious but inept attorney trying to conduct himself properly but somehow bungling the matter. Interpreted in this light, the exchange between Dillon and Fulcher provides additional evidence of Fulcher's incompetent handling of the trial.

in the record, and we reject the argument as implausible. Even if the State would have been forced to plea bargain had the continuance been granted, the belief that an attorney in open court would state that he was incompetent and that he would "take whatever disciplinary action is coming to me for being incompetent, and for doing this to the court and to the State and to the witnesses" (Tr. Vol. III at 638) solely to benefit Dillon by plea bargaining stretches credulity too far.

The trial court was correct in asserting that "it's the court's duty to determine * * * whether an attorney is competent or not to represent a defendant" (*id.* at 640). The State argues that the number of days between the catastrophic events in Fulcher's life and Dillon's trial minimized the drain inevitably placed on him as he tried to prepare for Dillon's trial. Specifically the State contends that because the divorce was final eighty-nine days before trial, and because Fulcher's father did not die until forty-seven days after trial began (Govt. Br. at 4), those events did not impact on Fulcher's trial preparation. Such reasoning is unduly narrow. Certainly the emotional reverberations the events must have had on Fulcher's concentration and mental and legal acuity merited more than the cursory attention the trial court gave them. Perhaps a divorce eighty-nine days before trial alone would not have affected Fulcher sufficiently for the trial court to consider his claim with care. Perhaps another attorney might not have been so affected. What is crucial is the cumulative effect on Fulcher of the three events—his divorce April 15, 1981, his brother's accident three days later and his father's surgery on July 5, 1981. That the cumulative effect is significant is readily apparent from Fulcher's request on July 7th—only when his father became critically ill, the proverbial last straw, did Fulcher realize how seriously this series of events had compromised his preparation.[4] Add to the effect

[4]The State also emphasized in its argument to the trial court that when the State had asked Fulcher in June at a pretrial conference whether

(Footnote continued on following page)

such events would have on any lawyer, regardless how experienced, the fact that Fulcher had been in practice only two and a half years, that this was his first murder case, and that evidently his only prior criminal experience was one "major felony case," and the cavalier attitude of the trial court is even more troubling.[5]

Errors by Fulcher that prejudiced Dillon's trial support Dillon's Sixth Amendment allegation. Contrary to the view of the district court, such errors do exist. The State of Indiana itself identified several such errors in its argument opposing Fulcher's request for a continuance. The State, in illustrating the great amount of preparation it had undergone for this trial that it did not want to see suspended for several months in case the continuance was granted, stated that "there's an immense amount of evidence in this case to go through" (Tr. Vol. III at 634). The State also indicated that Fulcher had been very dilatory about giving Dillon's defenses to the State, that in fact the

---

(Footnote continued from preceeding page)

he contemplated either withdrawing or asking for a continuance, Fulcher had said "he didn't know about a continuance," but "he wasn't going to withdraw" (Tr. Vol. III at 633). Perhaps Fulcher should have realized earlier the impact his emotional problems were having on his trial preparation. But that factor does not illuminate whether he really was having those difficulties and to what extent they were affecting his competence. Fulcher's comments indicate that only when his father had emergency surgery did he realize the extent to which the emotional stress he was under had disabled him from preparing adequately (*id.* at 637-638). Even the State had to concede that preparing for a murder trial "is a very strenuous thing to go through" (*id.* at 633).

[5]We were advised at oral argument that Dillon's trial was Fulcher's first capital murder case. We also note that appellate counsel advised us at oral argument that their involvement with the case stemmed from their being appointed to assist Fulcher in appealing Dillon's conviction and sentence. This appointment and Fulcher's subsequent withdrawal from the case provide further evidence of his unfamiliarity with this type of case and his ineffectiveness in providing Dillon competent counsel.

alibi defense he submitted was barred for not complying with statutory time requirements, and that Fulcher had failed to pursue avenues of investigation that he knew were available (Tr. Vol. III at 634-636).[6] Fulcher also conceded that he had spent less than four hours with Dillon from the time of arrest to trial (Tr. Vol. I at 6). The State counters this admission with evidence showing that Fulcher visited Dillon 10-15 times in the first jail in which he was imprisoned, and may have visited Dillon in the second jail in which he was confined (*id.* at 12). Even so, the frequency with which Fulcher visited Dillon in jail is not probative of the length of his visits there. Accepting Fulcher's statements regarding the amount of time he had taken to prepare, it is questionable whether he could have done so adequately. The State's own catalogue of Fulcher's deficiencies supports this conclusion (Tr. Vol. III at 634-636). The State may have been right in asserting that granting a continuance would have been "grossly unfair" to the State by possibly forcing it to plea bargain with Dillon, but this argument is irrelevant in the instant situation. Fairness to Dillon, not to the State, is the crux.

Fulcher's lack of preparation evidenced itself at Dillon's trial. To begin, Dillon attempted at Fulcher's recommendation to plead guilty to being an accomplice to the murder, a plea contrary to the facts already admitted into evidence and properly rejected by the trial judge. The prejudice of this defective plea is not measurable, but it surely affected the trial judge's assessment of aggravating and mitigating circumstances.[7] The Supreme Court

---

[6]In July 1984 Fulcher was disbarred for two years for neglect in prosecuting a case unrelated to the one before us, so that this dilatory pattern of conduct is not new to him. See *In the Matter of Fulcher*, 464 N.E.2d 327 (Ind. 1984).

[7]At the very least, the trial judge may have viewed the attempted accomplice plea as a calculated attempt to avoid punishment for the crime, and so as evidence that Dillon was in no way repentant. Such an

(Footnote continued on following page)

reiterated in *United States v. Cronic*, ___ U.S. at ___, 104 S.Ct. at 2045 n.19, that "[o]f course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no *bona fide* defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." No possible trial strategy could underlie this inappropriate accomplice plea, so that it must have resulted from Fulcher's incompetence.

Even more inexplicably, Fulcher never attempted to plea bargain with the State. Certainly failure to initiate plea-bargaining negotiations is not always error, but in a case in which the State would prefer the defendant's testimony at an accomplice's trial, defense counsel's failure to explore the possibility is inexplicable. Whether or not the State would have regarded the attempt favorably is

---

(Footnote continued from preceeding page)

assessment would affect his weighing of aggravating and mitigating circumstances. The only aggravating circumstance was that of the murder's being committed during a burglary, which the judge was to balance against the defendant's lack of any prior criminal history and "[a]ny other circumstances appropriate for consideration." Ind. Code §35-5-2-9 (1982). Given the defendant's youth and lack of any criminal record, assessing the ultimate penalty against him seems overly harsh. The painful deaths of the two victims evidently influenced the trial judge against the defendant, for he refused to consider Dillon's youth on the theory that the "capability of such cruelty in the mind of one that age cannot be considered a mitigating circumstance" (A. 22). This, of course, would particularly be true when the young defendant was unrepentant. We note that if the judge's logic were valid, then age would always work against young defendants convicted of the truly serious crimes for which the death penalty is permitted. The trial judge's statement reveals a misapprehension regarding the purpose of age in mitigating punishment. Judges and juries may consider age in mitigating the death penalty because young defendants have more of an opportunity to change their lives and to correct for one error than those who have more of a history of criminal conduct and are more hardened to the consequences for other people of their criminal acts. Consequently sentencing young adults irrevocably to death may be unfair, a consideration the trial judge refused to adopt.

irrelevant. What is relevant is the strong suggestion of unfamiliarity with the case and lack of preparation that the failure to try to plea bargain shows.

Fulcher's conduct at Dillon's death penalty hearing confirms this suggestion of lack of preparation. The only evidence that Fulcher offered, in addition to that already introduced at trial, was an extremely limited direct examination of the defendant. Fulcher asked Dillon his age, whether he had ever before been in trouble with the law, whether he had intended to kill anyone, and nothing else (Tr. Vol. VIII at 2076-2077). Fulcher offered no character witnesses, either at the trial or at the subsequent death penalty hearing. Surely doing so would be standard practice for an attorney defending an eighteen-year-old with no prior criminal record. Fulcher's almost non-existent effort to avoid the death penalty once Dillon's guilt was established is incomprehensible and was extremely prejudicial to Dillon.

If Fulcher's omissions and mistakes were "within the wide range of reasonable professional assistance," *Strickland v. Washington*, ___ U.S. at ___, 104 S.Ct. at 2066, given the heavy measure of deference due to counsel's judgment, then we could excuse them. But "all the circumstances," *id.*, indicate otherwise. Dillon's youth and lack of a prior criminal record, the irrevocability of the penalty invoked, Fulcher's own inexperience, and the heavy stress under which Fulcher, by his own admission, was unable to prepare adequately must all be considered. In sum, his errors prejudiced Dillon's trial sufficiently to warrant retrial.[8]

---

[8]The alleged errors unmentioned in our opinion lack sufficient merit to warrant reversal.

III.

Dillon also appeals the district court's denial of an evidentiary hearing on the issue of effective assistance of counsel. He alleges that the discovery of new evidence compels such a hearing. Specifically, he alleges that his trial counsel had a wager on the outcome of the trial, that he improperly conferred with counsel for the co-defendant, and that he never attempted or initiated a plea agreement or informed Dillon of any such agreement. The State concedes that the district court had the authority to hold an evidentiary hearing (Govt. Br. at 18). The only question is whether 28 U.S.C. §2254 mandated such a hearing, or if not, whether the district court should have held a hearing anyway.

Although the State argues that these assertions constitute issues not raised below and as such are barred from consideration on habeas review, see *Williams v. Duckworth*, 724 F.2d 1439, 1442 (7th Cir. 1983), the district court correctly held that the allegations represent merely "sub-issues" of the main issue (Mem. Order of April 20, 1984). In *Williams* the issue of effective representation of counsel was not raised at all in the state court proceedings. Dillon has raised this issue; now he merely wants to add additional substance to his allegations. Because Dillon knew the facts on which he bases his allegations prior to his filing for post-conviction relief, the evidence he cites is not of a character which would justify an evidentiary hearing. *United States ex rel. Barksdale v. Sielaff*, 585 F.2d 288, 293 n.4 (7th Cir. 1978), certiorari denied, 441 U.S. 962.

Contrary to what Dillon alleges, *Strickland v. Washington*, *supra*, did not establish new standards for evaluating Sixth Amendment ineffective assistance of counsel claims that would require a hearing. *Strickland*, ___ U.S. at ___, 104 S.Ct. at 2069. *United States ex rel. Cosey v. Wolff*, 682 F.2d 691 (7th Cir. 1981), is also not to the contrary. *Cosey* involved a claim of ineffective assistance of

counsel, in which this Court held that the "targeted counsel, if at all available, should be called and given the opportunity to meet and refute the serious charges made against him." *Id.* at 693. But in this case Fulcher is not available and probably would not become available. Moreover, he has already been heard from in the form of the affidavits he filed before trial and subsequent to trial, in which he admitted his own incompetence. Presumably he would not now repudiate those affidavits and so therefore would be unable to refute the charges against him. Moreover, in *Cosey* the charge of incompetence—that certain exculpatory witnesses were not interviewed or called by the defending attorney—could be explained as a part of counsel's trial tactics, since three of the five potential witnesses were biased because of their relationship to the defendant and the attorney could have believed that their testimony would be false. *Id.* at 693-694. No such explanation or possible trial strategy exists here. Consequently, the concern in *Cosey* that attorneys might be accused without an opportunity to defend themselves is absent. The district court's denial of an evidentiary hearing was proper.

IV.

Dillons' final allegation concerns the trial court's imposition of the death sentence. Indiana has a bifurcated system in which guilt is assessed at the first stage and the sentence is determined at the second, a process similar to that upheld by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153. Dillon alleges that the trial judge did not himself specifically find that the State had proved beyond a reasonable doubt each of the facts necessary to impose the death penalty. This allegation is patently false, as the Supreme Court of Indiana made clear in *Dillon v. State*, 454 N.E.2d 845, 852-854 (Ind. 1983). The trial judge stated that "the court finds beyond a reasonable doubt that the aggravating circumstances * * * outweigh the mitigating

circumstance" (quoted in *id.* at 854).[9] We therefore affirm the district court finding that the trial judge's findings comported with the Indiana death penalty statute.

The writ of habeas corpus is granted and Defendant will be released unless the case is retried within the next 90 days.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

[9]We agree with the district court that the dissenting justices were "pleading for clearer findings by the state's trial judges, but * * * such is a matter of form more than substance" (Mem. Order of June 21, 1984), especially in light of the trial court's explicit statement, in our eyes, that he had found each factor beyond a reasonable doubt.

Opinion by Judge Cummings

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Corrected January 2, 1985

December 28, 1984

Before

Hon. Walter J. Cummings, *Chief Judge*

Hon. John L. Coffey, *Circuit Judge*

Hon. Clement F. Haynsworth, Jr., *Senior Circuit Judge**

RICHARD DILLON,	) Appeal from the
	) United States
Petitioner-Appellant,	) District Court for
	) the Southern District
No. 84-2208 v.	) of Indiana,
	) Evansville Division
JACK DUCKWORTH, Warden	)
Indiana State Prison,	) No. 84 C 82
	)
Respondent-Appellee.	) Judge Gene E. Brooks

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Evansville Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed in part, the writ of habeas corpus is granted, and defendant will be released unless the case is retried within the next 90 days, in accordance with the opinion of this Court filed this date.

*The Honorable Clement F. Haynsworth, Jr., Senior Circuit Judge of the United States Court of Appeals for the Fourth Circuit, is sitting by designation.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No 84-2208

RICHARD DILLON
Petitioner-Appellant,

v.

JACK DUCKWORTH, Warden, Indiana State Prison
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION.
No. 84 C 82 — Gene E. Brooks, *Judge*.

ARGUED OCTOBER 31, 1984
DECIDED DECEMBER 28, 1984

ORDER

In the above-captioned case the following correction should be made in the fourth from last line of footnote 2 (page 4 of the slip opinion):

Omit "*id.*" and substitute therefore "*Strickland*, ___ U.S. at ___, 104 S.Ct. at 2067,"

Also, the following addition should be made in the third line of footnote 3 (page 5 of the slip opinion):

After "*Cronic*," insert "___ U.S. at ___ n.21,"

---

*The Honorable Clement F. Haynsworth, Jr., Senior Circuit Judge of the United Staes Court of Appeals for the Fourth Circuit, sitting by designation.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

January 16, 1985

Before

Hon. Walter J. Cummings, *Chief Judge*

RICHARD DILLON,	) Appeal from the
	) United States
Petitioner-Appellant,	) District Court for
	) the Southern District
No. 84-2208 v.	) of Indiana,
	) Evansville Division
JACK DUCKWORTH, Warden	)
Indiana State Prison,	) No. 84 C 82
	)
Respondent-Appellee.	) Judge Gene E. Brooks

On consideration of the "MOTION FOR A STAY OF ISSUANCE OF MANDATE AND OF ORDER" filed herein on January 11, 1985, by counsel for the respondent-appellee.

IT IS ORDERED that said motion is GRANTED and the effect of this court's December 28, 1984, order is stayed pending the filing of a petition for a writ of certiorari in the United States Supreme Court.

IT IS FURTHER ORDERED that the mandate of this court is STAYED to and including March 29, 1985.

Counsel shall notify the court immediately upon the filing of a petition for a writ of certiorari in the United States Supreme Court pursuant to Circuit Rule 17(d).

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

RICHARD DILLON,	)	
	)	
Petitioner	)	
	)	
v.	)	CAUSE NO. EV84-82-C
	)	
JACK DUCKWORTH, Warden, Indiana State Prison	)	
	)	
Respondent	)	

MEMORANDUM ORDER

This case is before the Court on a petition for writ of habeas corpus filed by the petitioner, Richard Dillon, on April 4, 1984. The petitioner was convicted in Knox County Superior Court on Two (2) counts of felony murder and one (1) count each of burglary and conspiracy in July, 1981. The prosecution sought the death penalty, and the jury recommended a sentence of death be imposed following a separate sentencing hearing. The trial judge followed the jury's recommendation and imposed the death sentence, pursuant to Indiana law, on August 21, 1981. The petitioner is currently in custody of the respondent at the Indiana State Prison, Michigan City, Indiana.

The charges against the petitioner stemmed from the murders of an elderly Petersburg, Indiana couple, William and Mary Hilborn. Both were killed on March 8, 1981 in their home when they apparently discovered Dillon and an accomplice in the dwelling. Both victims had sustained fatal stab wounds. The petitioner was arrested four days later when, after questioning by law enforcement officers, he confessed culpability and made a lengthy statement to Indiana State Police officers in the Pike County sheriff's

office. The statement, although challenged as inadmissible by trial counsel, was part of the evidence at trial.

The petitioner has followed the required appeals process since his conviction. His appellate counsel filed a motion to correct errors in the trial court and, when the motion was denied, pursued a direct appeal to the Indiana Supreme Court. The conviction and sentence were affirmed on April 18, 1983. All justices concurred on affirmation of the conviction; two justices dissented to the sentence on grounds the trial judge did not make a specific factual finding prior to sentencing as to the petitioner's guilt beyond a reasonable doubt as to the crimes charged. *See, Dillon v. State*, 454 N.E.2d 845 (Ind. 1983).

Thereafter a petition for writ of certiorari was filed in the United States Supreme Court (83-6136). The writ was denied on March 19, 1984. The petitioner was returned to the sentencing court to set a new execution date (May 24, 1984). The petitioner then filed this action in the United States District Court, Southern District of Indiana, Evansville Division.

This Court conducted a hearing on April 19, 1984 on the petitioner's motion for stay of execution and for an evidentiary hearing. The Court, by order of April 20, 1984, granted the stay of execution indefinitely and denied the motion for an evidentiary hearing. The parties timely filed briefs and appeared before the Court for oral argument on June11, 1984. In addition to reading the briefs filed by appellate counsel for the Petitioner and the Indiana Attorney General's Office, the Court has carefully reviewed the Record and Transcript of the state court proceedings in which the petitioner was convicted.

Four major contentions are discernible to the Court from the petition filed in this case:

(1) The petitioner received ineffective assistance of counsel in violation of the Sixth Amendment.

(2) The petitioner was convicted, in part, based on evidence obtained during an illegal detention in violation of his Fourth Amendment rights.

(3) The Indiana Death Penalty Statute is unconstitutional on two grounds, *i.e.*, testimony by the defendant during the guilt stage of the trial is admissible at the sentencing stage and the judge retains discretion to sentence defendant to death despite a jury recommendation of life imprisonment and can conceivably base that sentencing judgment on evidence not admitted at trial.

(4) The trial court findings were insufficient to support conviction of petitioner on either felony murder or intentional murder; trial judge did not find beyond a reasonable doubt that elements to support those charges existed prior to sentencing.

INEFFECTIVE ASSISTANCE OF COUNSEL BACKGROUND AND ANALYSIS

Petitioner first contends his Sixth Amendment right to the effective assistance of counsel was denied. While the Indiana Supreme Court previously has determined that trial counsel rendered effective assistance to the petitioner, that finding is not binding on the federal court in habeas corpus proceedings. Such is a mixed question of law and fact and is not a question of "basic, primary, or historical fact." *Strickland v. Washington*, ___ U.S. ___, 52 U.S.L.W. 4565, 4573 (1984), citing *Townsend v. Sain*, 372 U.S. 293, 309, n. 6 (1963).

Petitioner was represented by Petersburg, Indiana attorney Jimmy E. Fulcher at trial. Prior to the trial in July 1981, Mr. Fulcher had encountered several personal problems. In April 1981 his marriage of eleven (11) years ended in divorce over his protest. Three days after the final decree of dissolution was entered, Mr. Fulcher's brother was seriously injured in a motorcycle accident and was left partially paralyzed. In July, two days before the

suppression hearing in the Dillon case, Mr. Fulcher's father suffered a severe heart attack, underwent surgery the following day, and died later in the summer from that illness. It was against this background that Mr. Fulcher sought to withdraw from the case on grounds he was not competent to represent the petitioner, and also moved for a continuance of the trial.

The trial judge refused the motions made by Mr. Fulcher. First, the trial judge concluded that the representation had not been incompetent to date, and was further aware that Mr. Fulcher had been in preparation for the trial despite personal problems. Because the case had been venued to a neighboring county, the trial judge had made special arrangements to schedule the trial for that summer, and a postponement was likely to further complicate his docket and cause serious delays in the trial of the case. Moreover, there were obviously serious consequences of a postponement to the prosecution's case. A delay would have permitted Dillon's accomplice, who had not made any inculpatory statements, to demand a speedy trial without fear of Dillon's testimony. The prosecution had been counting on Dillon's testimony against the accomplice coming after Dillon's conviction. The respondent argues now that a tactical advantage might have been gained from a postponement and asserts such might have been the knowing strategy employed by Mr. Fulcher.

Whatever Mr. Fulcher's intentions, the record makes clear that he did submit an affidavit attesting to his own incompetence at the suppression hearing two weeks prior to trial. The trial judge chose to disregard the affidavit and proceed with the case. The following day Dillon took the stand and, under questioning by Mr. Fulcher, stated he was satisfied with his representation and had asked that Mr. Fulcher not withdraw as his attorney. The questioning was thorough and did not necessitate any further questions by the trial judge.

The petitioner contends, however vaguely, that Mr. Fulcher's shortcomings were of such magnitude that his

constitutional rights were violated and that his defense was prejudiced. In addition to the affidavit, the petitioner also alleges there was no discernible strategy employed by defense counsel, that he failed to tender any proposed final jury instructions[,] that he failed to advise petitioner adequately of the necessary factual foundation on which a guilty plea might be based, that he failed to initiate or conduct any plea negotiations, and that a potential conflict of interest existed during communications between Mr. Fulcher and the attorney for Dillon's alleged accomplice.

EFFECTIVE COUNSEL STANDARD

The right to effective assistance of counsel has merited great emphasis in the judicial history of this nation.

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.

Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

The constitutional considerations were further summarized by Justice Stevens in *United States v. Cronic*, ___ U.S. ___, 52 U.S.L.W. 4560, 4562 (1984): "The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."

The burden of establishing the ineffective assistance of counsel is on the defendant. *United States v. Fleming*, 594 F.2d 598 (7th Cir. 1979), *cert. denied* 442 U.S. 931 (1979); *Matthews v. United States*, 518 F.2d 1245, 1246 (7th Cir. 1975).

Historically, several standards have been recognized by which courts measure alleged incompetence of counsel. Among the most traditional standards is the familiar

"mockery of justice" standard. *Brinkley v. Lefevre*, 621 F.2d 45 (2nd Cir. 1980), *cert. denied* 449 U.S. 868 (1980); *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), *cert. denied* 435 U.S. 1011 (1978). The Seventh Circuit position on this standard was recently stated in *United States ex rel. Heral v. Franzen*, 667 F.2d 633, 635 (1981):

> The standard for determining ineffective assistance of counsel is whether counsel's performance "meets a minimum professional standard." *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied* 423 U.S. 876 (1975). This, in turn, requires an examination of "the totality of circumstances in the particular case." *United States v. Phillips*, 640 F.2d 87, 92 (7th Cir.), *cert. denied* 451 U.S. 991 (1981). Where an action can fairly be construed as a "trial tactic," this court will not find the action to constitute ineffective assistance simply because in hindsight it seems inadvisable. (cites omitted).

Indiana law was reviewed in the Indiana Supreme Court's ruling in this petitioner's case in *Dillon, supra*, 454 N.E.2d at 848:

> Our law regarding the issue of competency of counsel is well settled. Counsel is presumed to have prepared and executed his client's defense effectively, and strong and convincing evidence is required to rebut the presumption. *Lindley v. State*, 426 N.E.2d 398 (Ind. 1981); *Rinard v. State*, 271 Ind. 588, 394 N.E.2d 160 (1979). Incompetency of counsel revolves around particular facts of each case and the reviewing court will consider the totality of the circumstances surrounding counsel's pretrial preparation and the actual conduct of the trial. The standard of review is the mockery of justice test as modified by the adequate legal representation standard. *Hollon v. State*, 398 N.E.2d 1273 (Ind. 1980); *Crisp v. State*, 271 Ind. 534, 394 N.E.2d 115 (1979); *Cottingham v. State*, 269 Ind. 261, 379 N.E.2d 984 (1978).

The standards and method of analysis in this area of the law recently were clarified in *Strickland v. Washington, supra.* In that opinion, Justice O'Connor outlined the two-step approach by which courts may determine whether ineffective assistance of counsel was rendered in a criminal proceeding.

Strickland reaffirms traditional adherence to providing effective assistance of counsel and declares, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 4750.

Under *Strickland*, two components must be considered by the court when ineffectiveness of counsel is alleged:

> The defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.
>
> * * *
>
> The defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id.

The Court's review of Mr. Fulcher's conduct must be "highly deferential" and take into account that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 4570-71. The Court is required to make a strong presumption that counsel rendered adequate legal assistance and exercised reasonable professional judgment. *Id.*

The record in this case reveals that Mr. Fulcher was an active, aggressive advocate despite serious personal problems. Several timely and appropriate motions were filed on the petitioner's behalf prior to and during the trial. Mr. Fulcher sought and was granted a change of venue from Pike County on grounds of pre-trial publicity. He also twice attempted to prevent introduction of the confession on grounds it had been improperly obtained: once through a petition for writ of habeas corpus in the state court and once on a motion to suppress. The suppression hearing was lengthy and Mr. Fulcher appeared to be well prepared and thorough.

As to discovery matters, Mr. Fulcher met with his client repeatedly prior to trial and received all discovery materials turned over by the prosecution. Although it was his contention that he had insufficiently prepared for trial, the actual record reveals his familiarity with the facts and issues in the trial. His cross examination was appropriate and often quite effective in eliciting evidence before the jury.

The Court does not here substitute its judgment for that of trial counsel's in the failure to initiate plea negotiations. The record reveals that the prosecution probably would not have been interested in any deal, and there is no standard by which defense counsel is required to initiate such negotiations. It appears to the Court, from the testimony given by the petitioner at trial, that his position was simply a contention of innocence. When the record of his attempted guilty plea is read together with his direct testimony, there is no other conclusion to draw. Perhaps this is a defense at odds with the facts, as appellate counsel contends, but a defense attorney is at the mercy of his client if his lone defense is that an earlier confession was contrived and his later testimony claiming innocence is true. Based on this record, the Court cannot conclude Mr. Fulcher's conduct with respect to the attempted guilty plea or the defense

asserted was an error of such magnitude as to constitute ineffective assistance of counsel.

While it is true that no proposed final jury instructions were submitted by Mr. Fulcher, appellate counsel fails to specify which instructions should have been submitted, particularly in light of the instructions given by the court. The failure to submit any proposed final instructions is not necessarily an error of constitutional proportions.

While the record also reveals the presence of another attorney at the counsel table during the suppression hearing, the Court has no evidence before it which would remotely support an allegation of conflict of interest. The other attorney present did indeed represent Dillon's alleged accomplice, but there is simply no evidence that Mr. Fulcher at any time breached the duty of loyalty to his client.

Because of the affidavit filed by Mr. Fulcher prior to trial asserting his incompetence to continue as defense counsel, the Court has undertaken a careful review of the record as a whole. As the foregoing should reveal, there is no evidence from which this Court can make a finding that Mr. Fulcher's conduct was deficient under the *Strickland* analysis. It is this Court's finding that Mr. Fulcher rendered competent counsel, particularly in light of the substantial evidence which supported the State's case. Even appellate counsel concedes that the record speaks well of Mr. Fulcher's work. It is the affidavit, almost standing alone, that provides the basis for the petitioner's argument under the Sixth Amendment. This Court concludes that the record does not support a finding of ineffective assistance of counsel.

Even if the law supported a finding that the affidavit alone was sufficient to find that counsel was ineffective, the Court would also have to determine whether counsel's deficiencies prejudiced this petitioner's defense. "The

defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 4572. Therefore, even if an appellate court were to rule that the affidavit in this case equated with deficient counsel under *Strickland*, petitioner could not satisfy the second prong of the analysis and his contention would still fail.

ILLEGAL DETENTION-FOURTH AMENDMENT

The petitioner next contends that his Fourth Amendment rights were violated when police officers took him to the Pike County sheriff's office on March 12, 1981. During that interview, the petitioner confessed to the crime charged and was arrested. He sought to exclude the inculpatory statement from evidence introduced at the trial, and now again argues that the interview was an illegal detention. *See, Dunaway v. State*, 442 U.S. 200 (1979).

The respondent has directed the Court's attention to two cases dealing with a habeas corpus petition based on Fourth Amendment grounds. The United States Supreme Court has held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 482 (1976). In *Cardwell v. Taylor*, ____ U.S. ____, 76 L.Ed.2d 333 (1983), the Court reaffirmed this position by reversing a Ninth Circuit decision. The Court of Appeals had remanded a Fourth Amendment habeas corpus case to the district court for an evidentiary hearing to determine whether certain statements made by the petitioner had been voluntary. As the Supreme Court pointed out, *Dunaway* dealt with Fifth Amendment questions of voluntariness. "[T]he Court in *Dunaway* sought to dispel any 'lingering confusion between

'voluntariness' for purposes of Fifth Amendment and the 'causal connection' test established' for purposes of the Fourth Amendment." *Cardwell*, 76 L.Ed.2d at 335, citing *Dunaway*, 442 U.S. at 219. The Supreme Court concluded the Court of Appeals should not have considered the petitioner's argument on Fourth Amendment grounds that inculpatory statements should have been excluded. "Only if the statements were involuntary, and therefore obtained in violation of the Fifth Amendment, could the federal courts grant relief on the collateral review." *Id.*

The petitioner here makes only a Fourth Amendment claim, and pursuant to the Supreme Court directive, this Court cannot consider such a claim when it has received "full and fair litigation" in the state courts. In this case, the petitioner was afforded a two-day suppression hearing prior to trial and full appellate consideration in the Indiana Supreme Court. This Court finds that such "full and fair litigation" requirements have been satisfied and needs [*sic*] not further consider the allegations on this issue.

CONSTITUTIONALITY OF INDIANA DEATH PENALTY STATUTE

The petitioner next makes a Fifth Amendment claim alleging, in essence, that his rights against self-incrimination were violated when he chose to testify at the guilt stage of the proceedings and had that testimony incorporated into the sentencing hearing. The allegation is without merit.

No objection was made to the incorporation of the testimony at the sentencing stage. Moreover, defense counsel also requested that testimony from the guilt stage be included in the jury's consideration at the sentencing stage. Thus, there are serious questions whether the allegation should even be considered when the alleged error was not preserved in the record.

The process adopted by the Indiana Legislature in

passing the death penalty statute is within the guidelines of *Gregg v. Georgia*, 428 U.S. 153 (1976). The procedure challenged is constitutional. The sentencing hearing, as the State correctly argues, is in reality a continuation of the same proceeding. It is clear that the defendant in such a case is "at risk" twice in the guilt stage and the sentencing stage. But unless a different jury is [*sic*] seated to hear the sentencing stage testimony, all evidence admitted at the guilt stage will weigh heavily in the jury's sentencing deliberations. The law does not require such a two-jury procedure.

In any event, the Court fails to see how this petitioner was prejudiced by the admission of such testimony in the sentencing portion when the theme of his prior testimony had been his innocence in the actual killing of the Hilborns. Had the jury found the petitioner's testimony at all credible, *i.e.*, that he had only been a "lookout" while others did the actual killing, that certainly could have been a mitigating factor in their consideration of an appropriate penalty. No prejudice attached as a result of the incorporation of the testimony complained of.

The petitioner's further contention that the Indiana statute is unconstitutional because a judge could potentially base the ultimate sentencing decision on non-admissible evidence also is without merit. The judge, under the statute, is required to follow the same guidelines in making a sentence determination as is the jury. *Indiana Code* §35-50-2-9. He must make specific findings of either aggravating or mitigating circumstances, and such was done in this case.

SUFFICIENCY OF TRIAL JUDGE'S FINDINGS

The final contention by the petitioner is that the findings of the trial judge in imposing sentence were insufficient under Indiana law. This contention was seized as a result of the Indiana Supreme Court's decision in this case. There,

two dissenting justices concluded that the findings failed because there was "no direct statement...that the sentencing judge was persuaded beyond a reasonable doubt that the Defendant is guilty of felony murder and at the time of such offense intentionally killed one of the victims, the elements of the aggravating circumstance relied upon by the State." *Dillon v. State*, 454 N.E.2d at 856. The dissenting justices had raised the issue *sua sponte*.

Clearly, the Indiana Supreme Court had an opportunity to consider this alleged deficiency. It appears the dissenters are pleading for clearer findings by the state's trial judges, but this Court concludes that such is a matter of form more than substance. Where a majority of the state's highest court would not find such a deficiency merited reversal, this Court will not interfere. Moreover, the findings appear to this Court clear enough to support the trial judge's decision to impose the death sentence and comply with Indiana law.

CONCLUSION

In light of the foregoing, this Court DENIES the petitioner's writ of habeas corpus as to all allegations raised in the petition. The Court will enter judgment on a separate entry DENYING the petition and DISMISSING this case and will further ORDER the stay of execution entered April 20, 1984 VACATED as of this date.

DATED this 21st day of JUNE, 1984, Evansville, Indiana.

/s/Gene E. Brooks

Judge Gene E. Brooks
United States District Court
Southern District of Indiana

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

RICHARD DILLON,	)	
	)	
Petitioner	)	
	)	
v.	)	CAUSE NO. EV84-82-C
	)	
JACK DUCKWORTH, Warden, Indiana State Prison	)	
	)	
	)	
Respondent	)	

JUDGMENT ENTRY

This matter comes before the Court on the petition of Richard Dillon for a writ of habeas corpus. The Court, having considered the issues presented in his petition and having entered a memorandum order on this date, now DENIES the petition and DISMISSES this cause of action. Concurrent with the dismissal of this case, the Court further ORDERS the stay of execution entered by order dated April 20, 1984 is hereby VACATED.

IT IS SO ORDERED.

DATED this 21st day of JUNE, 1984 at Evansville, Indiana.

/s/ Gene E. Brooks

Judge Gene E. Brooks
United States District Court
Southern District of Indiana

Richard DILLON, Appellant
(Defendant below),

v.

STATE of Indiana, Appellee
(Plaintiff below).

No. 282S67.

Supreme Court of Indiana.

Oct. 3, 1983.

HUNTER, Justice.

The defendant, Richard Dillon, was convicted by a jury of two counts of felony murder, Ind.Code §35-42-1-1(2) (Burns 1979 Repl.), one count of burglary, a Class A felony, Ind.Code §35-43-2-1 (Burns 1979 Repl.), and one count of conspiracy to commit burglary, a Class A felony, Ind. Code §35-41-5-2 (Burns 1979 Repl.). The jury also recommended that a sentence of death be imposed upon defendant, Ind.Code §35-50-2-9 (Burns 1979 Repl.), and defendant was thereafter sentenced to death by the trial court.

His direct appeal challenges the legality of the death sentence and presents the following issues for our review:

1. Whether the defendant was denied effective assistance of counsel at trial;

2. Whether the trial court erred in denying defendant's motion to suppress his inculpatory statement; and

3. Whether Indiana's death penalty statute is unconstitutional as violative of due process.

A brief summary of the facts from the record most favorable to the state shows that William and Mary Hilborn were found stabbed to death in their home in Petersburg, Indiana, on March 8, 1981. Defendant was observed walking in the vicinity of the Hilborns' property around the time of the murders by a deputy sheriff. He was questioned by the police at work on March 10, 1981, and at his home on

March 11, 1981. He denied being in Petersburg at the time of the murders and said he had been in Princeton, Indiana, with a friend, J.R. Thompson. A knife which was identified as the murder weapon was found in Thompson's car. On March 12, 1981, the police asked defendant if he would go with them to the sheriff's office to clear up some discrepancies concerning his actions on March 8. Defendant voluntarily accompanied the officers to the sheriff's office. He signed two waiver of rights forms and gave two statements, the second of which was a confession.

I.

Defendant first alleges that he was denied the effective assistance of counsel at his trial. On July 7, 1981, approximately two weeks prior to the trial, the court held a hearing on defendant's motion to suppress. At this time his retained counsel filed a motion for postponement and continuance which reads in pertinent part:

> "1. That counsel for the defendant may have not had the presence of mind to effectively represent the defendant during the course of the pre-trial proceedings, due to personal problems, to-wit:
>
> > "a. On April 15, 1981, during the course of pre-trial proceedings, counsel for the defense was divorced from his wife of eleven (11) years, which divorce was the desire of counsel's wife, and against said counsel's wishes.
> >
> > "b. On April 18, 1981, counsel's brother, Ronald D. Fulcher, was seriously injured in a motorcycle accident, in Knox County, and remains paralyzed in the Veterans Hospital in Hines, Illinois at this date.
> >
> > "c. That on Sunday, July 5, 1981, counsel's Father, Randall R. Fulcher, was rushed to the Veterans Hospital in Indianapolis, Indiana and on Monday July 6, 1981 underwent eleven hours of emergency heart surgery and at this date

remains in an unconcious [sic] state, in serious condition.

"2. That the State continues daily to provide the defendant with new items of discovery, despite statements prior thereto that discovery is; complete, and such new discovery has led the defendant to new avenues of defense which defendant should pursue, to provide an adequate defense.

"3. That the course of the investigation by defense has turned up possible new evidence, which could not have been discovered in the short period of time allowed for pre-trial proceedings.

"WHEREFORE, defendant respectfully submits to this Court that to proceed with the trial as scheduled, after such a short period of time for preparation of its defense would effectively deprive defendant of its right to a fair trial, and that to proceed with hearings and trial as scheduled while defendant's counsel is having personal problems, and immediately after defense counsel's other personal problems would effectively deny the defendant of the right to competent counsel."

The hearing was continued on July 8, 1981, and the trial court specifically asked defendant if he was aware of his attorney's personal problems and if he wanted his attorney to withdraw. Defendant answered that he was aware of the circumstances but that he did not wish the attorney to withdraw. The court reminded the attorney that it was the court's duty to determine whether or not an attorney was competent to represent a defendant. Here the attorney had been hired four months prior to the trial. The court also said he had considered all the hours of preparation which had already been spent by both parties on this case, the fact that witnesses had been subpoenaed, jury panel members had been notified, and the court's calendar for the next six months was extremely congested so any delay at that time would mean a long postponement for the trial. After hearing further arguments by both sides, the court denied

both the motion to suppress and the motion for a continuance. However, the record shows that after the jury had been selected the court did grant a continuance so that counsel would have an extra weekend to prepare for the trial. The trial proceeded on Monday, July 20, 1981, without further objection by defendant or his counsel.

At the hearing on the motion to correct errors the trial counsel filed an affidavit stating that due to his personal problems he had not had time to adequately prepare for defendant's trial, that he felt he had not been competent to represent the defendant properly, and that he felt a new trial should be granted. The state filed counter affidavits which summarized many of the actions the attorney had taken in preparing for this trial, his conduct during the trial itself, and the times when the various personal problems arose in relation to the time of the trial. The court denied the motion to correct errors with the following findings:

> "The court finds that:
>
> "1. There was sufficient evidence before the jury from which they could find the defendant guilty beyond a reasonable doubt."
>
> "2. At the pre-trial hearing on defendant's motion to suppress, the court found that the statements of the defendant were admissible at trial. No new evidence was presented at trial which would have required a reversal of that ruling.
>
> "3. The Indiana Supreme Court has upheld the constitutionality of the death penalty statute.
>
> "4. On the first day of trial, prior to voir dire of the jury, defendant's attorney requested a continuance which was denied. He then offered to withdraw as counsel for defendant and defendant was given the opportunity to accept the withdrawal and have other counsel appointed. The defendant elected to continue with his hired counsel. Thereafter, defendant's attorney performed adequately during trial.

"5. After the evidentiary part of the trial had begun, the defendant, outside the presence of the jury, attempted to enter a plea of guilty which was rejected because the court, based upon defendant's rendition of the facts, could not find a factual basis for the plea. The court immediately thereafter sequestered the jury.

"Upon these findings the court denies defendant's motion to correct errors."

Defendant's argument of incompetency of counsel is based primarily upon the allegedly inadequate time his counsel had for preparation and the fact that counsel failed to tender any final instructions. Our law regarding the issue of competency of counsel is well settled. Counsel is presumed to have prepared and executed his client's defense effectively, and strong and convincing evidence is required to rebut the presumption. *Lindley v. State*, (1981) Ind., 426 N.E.2d 398; *Rinard v. State*, (1979) 271 Ind. 588, 394 N.E.2d 160. Incompetency of counsel revolves around the particular facts of each case and the reviewing court will consider the totality of the circumstances surrounding counsel's pretrial preparation and the actual conduct of the trial. The standard of review is the mockery of justice test as modified by the adequate legal representation standard. *Hollon v. State*, (1980) Ind., 398 N.E.2d 1273; *Crisp v. State*, (1979) 271 Ind. 534, 394 N.E.2d 115; *Cottingham v. State*, (1978) 269 Ind. 261, 379 N.E.2d 984.

A careful examination of the record in this case reveals the following facts: counsel entered his appearance for defendant approximately four months before the trial; his wife had filed for divorce one month prior to his entering his appearance in this cause; his divorce was final eighty-nine days before the trial; his brother's accident occurred eighty-five days before trial; and his father had been ill for some time prior to trial but did not die until forty-seven days after the trial began. Thus, while we appreciate the fact that counsel was experiencing unusual pressure

during that pretrial period, his personal problems and trial preparation time were spread out over a period of months, and he had a reasonable amount of time to prepare for this trial.

Defendant also argues that his counsel's failure to tender any final instructions was an indication of his incompetence. We disagree. The record shows that defendant's trial counsel prepared and tendered to the court eleven proposed preliminary instructions, but these were either withdrawn or refused as covered by the court's own instructions. The trial court gave many of its own instructions, both preliminary and final, which were sufficient to cover the necessary points of law. Defendant does not point out now any way in which the trial court's instructions were improper or inadequate. Trial counsel's failure to tender instructions on issues which are adequately covered by the court's own instructions does not show incompetence. *Leaver v. State*, (1981) Ind., 414 N.E.2d 959.

The record further shows many specific actions the attorney took on defendant's behalf both prior to and during the trial. Prior to trial, the attorney sought and was granted a change of venue from Pike County. He interviewed witnesses prior to trial, requested and was granted full discovery, viewed all of the state's physical evidence, read and copied the grand jury testimony, filed several pretrial motions, attended and offered evidence at pretrial hearings, attended omnibus hearings, subpoenaed and presented witnesses on defendant's behalf, consulted with the state's attorney several times prior to trial, viewed the list of prospective jurors, and consulted with the attorney representing defendant's accomplice. He visited defendant at least ten to fifteen times while he was in the Pike County jail and on four or five occasions in the jury room of the Pike Circuit Court, averaging forty to sixty minutes on each occasion. During the trial, counsel extensively cross-examined the state's witnesses, called witnesses on behalf of defendant, called defendant as a witness in his own

behalf, and made timely objections and a lengthy closing argument to the jury.

In this case, there was evidence to show that the defendant's trial counsel had rendered adequate assistance in both the pretrial phase and the trial itself and that he had presented a partial alibi defense for defendant in the face of substantial evidence to the contrary. He was well prepared for the trial and had an informed basis for making his trial strategy decisions. Furthermore, defendant has not presented any specific facts which demonstrate ineffective representation. The trial as a whole was not a mockery of justice. In fact, the record shows that defendant had vigorous representation in the face of overwhelming evidence, including his own confession, against him. The record does not show that defendant was denied effective assistance of counsel.

II.

Defendant next alleges that the trial court erred in admitting into evidence his inculpatory statements because they were the product of an unlawful detention. The facts surrounding the giving of these statements were brought out at the hearing on defendant's motion to suppress. During the investigation of the instant crime, defendant had been questioned briefly two different times by police officers, once at his home and once at work. The police thought he might be a witness to the crime as he had been seen near the scene of the crime. The police questioned defendant's friend, J.R. Thompson, and found evidence in Thompson's car that indicated defendant might have been lying to them when he originally answered their questions.

At this point, on March 12, 1981, four days after the murders, two police officers went to defendant's home and saw his brother out in the yard. The brother called for defendant to come over to the car and the officers identified themselves and said they would like to talk to him. They asked defendant if he would come to the police station in

order to talk about some of the things he had previously told them concerning events on the day of the murders. Defendant said, "Sure." Then defendant and one of the officers went into the house and told defendant's mother where they were going. Defendant got a jacket from his room. He rode to the station in the back seat of the police car. He was not handcuffed and was not under arrest or treated as a suspect. Both officers rode in the front of the car. The officers specifically testified that they told defendant he didn't have to come with them if he didn't want to, but he voluntarily agreed to go with them.

At the police station, defendant was taken to the sheriff's office which was furnished with a wooden desk, comfortable chairs, a bookcase and carpeting. He was given a waiver of rights form which he read and signed. He then gave a taped statement about his activities on March 8 in which he indicated that he had been with J.R. Thompson but had not been in the vicinity of the crimes. The two police officers left the room and discussed what defendant had told them. They concluded that his statements were not truthful, in light of other information they had which showed that he had been seen by a deputy sheriff in the vicinity of the victims' home near the time the murders occurred. The officers returned to the room and told defendant they felt his statements were not truthful. Defendant was advised that they were discussing the crime of murder and the possible penalties, but that the final decision on the charges to be filed was up to the prosecutor. Defendant never asked to have an attorney present but he wanted the prosecutor to be contacted so he would know what charges he would be facing. One of the officers left the room to call the prosecutor, who agreed to come to the sheriff's office. Then, defendant looked at the officer who was in the room with him and said, "Well, we did it," and started crying. The other officer returned to the room and defendant was again advised of his rights and signed a second waiver of rights form. He gave a second statement admitting his part in the murders.

After the second statement was given, the prosecutor and his deputy arrived and advised defendant of the possible criminal charges he faced. The entire period of questioning took approximately two and one-half hours. Defendant was free to leave at any time during this period and the doors to the office were not locked. He did not ask for any food and was given a soft drink. He was never threatened or physically abused and no promises of leniency were made. Defendant was not arrested until after he gave his taped confession and the following day he appeared before a magistrate all as provided by statute.

Defendant contends that he could not have voluntarily waived his rights as he had been smoking marijuana and took two Quaaludes on the day he was questioned. Defendant's mother testified that she and her husband went to the police station and asked to see defendant, but the officers wouldn't let them see him and just said they would tell them what happened. In rebuttal, Officer Nelson testified that in his opinion defendant was not under the influence of drugs at the time the statements were given. Officer Sibbitt testified that he did not recall defendant's parents asking to see their son but only that they inquired where he was and what was going on and then left the sheriff's office.

As a court of review we review the question of the admissibility of a confession as we do other sufficiency matters. We do not weigh the evidence, but rather determine whether there was substantial evidence of probative value to support the trial court's finding. This is true even though conflicting evidence is presented on the issue of voluntariness. *Long v. State*, (1981) Ind., 422 N.E.2d 284; *Battle v. State*, (1981) Ind., 415 N.E.2d 39; *Arch v. State*, (1978) 269 Ind. 450, 381 N.E.2d 465.

It is clear that if a confession is the product of an unlawful detention or an illegal arrest it is inadmissible. *Dunaway v. New York*, (1979) 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824; *Brown v. Illinois*, (1975) 422 U.S. 590, 95 S.Ct. 2254, 45

L.Ed.2d 416. *Triplett v. State*, (1982) Ind., 437 N.E.2d 468; *Morris v. State*, (1980) Ind., 399 N.E.2d 740. However, it is also clear that not every police-citizen encounter amounts to a "seizure" of the person so that an arrest or unlawful detention has occurred. The test for determining whether a person has been "seized" for Fourth Amendment purposes is whether, considering all the circumstances surrounding the police-citizen encounter, the defendant entertained a reasonable belief that he was not free to leave. *Dunaway v. State*, (1982) Ind., 440 N.E.2d 682; *United States v. Mendenhall*, (1980) 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (plurality opinion); *Barber v. State*, (1981) Ind.App., 418 N.E.2d 563.

In this case, the facts are sufficient to show that defendant voluntarily accompanied the officers to the police station and gave two voluntary statements. The officers specifically told defendant he did not have to come with them if he didn't want to. He was not handcuffed or otherwise treated as a suspect or an arrestee and rode by himself in the back seat of the police car to the police station. He talked to the officers in the sheriff's private office with both doors unlocked and was not physically restrained, abused, or threatened. He was not unreasonably interrogated or deprived of food, water, or rest. Defendant admitted that he had not been threatened or coerced by the police and that he had signed the waiver of rights forms and given the statements. There was no promise of leniency. This was sufficient evidence to support the trial court's finding that defendant's confession was not the product of an illegal detention and was voluntarily given.

III.

Defendant finally argues that Indiana's death penalty statute violates due process and is unconstitutional in several respects. He first argues that our statute vests the trial judge with unlimited discretion in imposing the death

penalty after a jury trial as the judge is not bound by the jury's recommendation or any other objective standards. There is no merit to this contention since the statute specifically states: "The court shall make the final determination of the sentence, after considering the jury's recommendation, *and the sentence shall be based on the same standards that the jury was required to consider.*" Ind.Code §35-50-2-9(e)(2) (emphasis added). He also argues that due process is violated becuased the trial judge can consider all evidence introduced during the trial at the sentencing hearing. He alleges that this allows the judge to consider inadmissible evidence presented to the court for rulings during the course of the trial as part of the basis for imposing the death penalty. Contrary to defendant's allegations, the statute does limit the type of evidence which may be considered during the sentencing hearing in the following manner: "The jury, or the court, may consider *all the evidence introduced at the trial stage* of the proceedings, together with new evidence presented at the sentencing hearing." Ind.Code §35-50-2-9(d) (emphasis added). Evidence which is introduced at trial is not inadmissible evidence. Furthermore, the court's reasons for imposing the death penalty must be stated in writing and are reviewed by this court to safeguard against the influence of improper or prejudicial factors at the trial level and to determine that there were no elements of arbitrariness or capriciousness in the sentencing decision.

Defendant further argues that his right against self-incrimination is violated since any testimony he gives during the trial on the underlying felony is also considered during the sentencing hearing. However, our statute clearly does not prevent an accused from exercising his right not to testify during the trial on the underlying felony. When testimony which defendant gave at trial is used again at the sentencing hearing, there is no violation of any constitutional right since the issue of guilt or innocence has already been determined. Furthermore, the state bears the

burden of proving the existence of at least one of the aggravating circumstances beyond a reasonable doubt before the death penalty can be imposed. Ind.Code §35-50-2-9(e).

Defendant also contends that the death penalty constitutes vindictive justice and therefore violates Article 1, Section 18 of the Constitution of the State of Indiana. He further contends that the provision for the same trier of fact to determine both the merits of the underlying felony and the applicability of the death penalty violates his right to due process. We have dealt with both these arguments in previous cases. We have consistently held that the death penalty does not offend Article 1, Section 18 of our state constitution and that our death penalty statute is not unconstitutional *per se*, as being in derogation of the Eighth Amendment to the United States Constitution. We have found that Article 1, Section 18 of the Indiana Constitution is an admonition to the legislative branch of the state government and is addressed to the public policy which the legislature must follow in formulating the penal code. It applies to the penal laws as a system to insure that these laws are framed upon the theory of reformation as well as the protection of society. *Schiro v. State*, (1983) Ind., 451 N.E.2d 1047; *Williams v. State*, (1982) Ind., 430 N.E.2d 759, *appeal dismissed*, (1982) ___ U.S. ___, 103 S.Ct. 33, 74 L.Ed.2d 47; *Brewer v. State*, (1981) Ind., 417 N.E.2d 889, *cert. denied*, (1982) 458 U.S. 1122, 102 S.Ct. 3510, 73 L.Ed.2d 1384; *Judy v. State*, (1981) Ind., 416 N.E.2d 95; *French v. State*, (1977) 266 Ind. 276, 362 N.E.2d 834.

The procedural scheme set out in our statute limits the imposition of death sentences so as to insure that they will not be inflicted arbitrarily or capriciously in accord with the decisions and opinions of the United States Supreme Court. *Gregg v. Georgia*, (1976) 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *Proffitt v. Florida*, (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; *Jurek v. Texas*, (1976) 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929. Although our statute

provides that the same jury that made the guilt determination hears the sentencing portion of the trial, the adherence to the standard of proof beyond a reasonable doubt and the customary evidentiary rules insure that fundamental fairness and due process are protected during the proceedings. Furthermore, the sentencing proceeding is not a separate guilt determination. Our statute provides that the death penalty may be imposed if the circumstances of the offense and the character of the offender both warrant; our death sentencing procedures are consistent with and in full compliance with the requirements set forth by the Supreme Court in *Proffitt v. Florida, supra,* and *Gregg v. Georgia, supra.*

We now turn to a review of the imposition of the death penalty in the instant case. A careful review of the record reveals that all of the statutory procedures were followed in the trial of this defendant. During the guilt determination phase of the proceedings, the jury found beyond a reasonable doubt that defendant conspired with another individual to commit burglary in the home of William and Mary Hilborn because they heard the Hilborns kept a large amount of money in their home. They carried out this plan by breaking and entering the residence with the intent to commit theft and were inside the house when the victims returned home. The testimony showed that defendant had an opportunity to leave the house before committing the murders, but decided it would be necessary to kill both the Hilborns so there wouldn't be any witnesses. Defendant was the person who actually stabbed the victims. The victims were an elderly couple and both were stabbed numerous times. Mrs. Hilborn was also slashed in several places on her neck and hand apparently in an effort to get her to tell where the money was hidden. She had a severe stab wound in her stomach and a fatal stab wound in her back which according to the doctor's testimony was received after she had already fallen to the floor. There was evidence that Mr. Hilborn had struggled with his assailant

and tried to defend himself with a billy club. He also had a severe stab wound to the stomach and apparently received a fatal wound to his heart when he attempted to go to the aid of his wife. No money was found in the house even though the victims had cashed their monthly retirement check a few days earlier. The evidence clearly sustains the jury's finding that defendant intentionally killed both victims while committing the burglary.

A separate sentencing hearing was held following the guilt determination at which time defendant presented evidence in his own behalf. Proper and complete instructions were given at both phases of the trial. By a written, unanimous verdict, the jury returned a recommendation that defendant be sentenced to death. The trial judge then considered all the evidence in the case, the jury's recommendation, and the aggravating and mitigating circumstances before imposing the death penalty. He entered his written statement of findings and reasons for the imposition of the death penalty in accordance with the requirements of Ind.Code §35-50-2-9. This written statement shows that the judge considered the specific facts of the instant crimes and the character of defendant. After a brief summary of the evidence in his written findings the judge stated:

> "Accordingly, the jury was justified in finding beyond a reasonable doubt the existence of the aggravating circumstances of an intentional killing of the victims while committing a burglary and that the defendant committed another murder.
>
> "In reviewing the seven possible mitigating circumstances considered by the jury, the court finds:
>
> "1. The defendant had no significant history of prior criminal conduct. This is a mitigating circumstance which must be weighed against the aggravating circumstances.
>
> "2. There was no evidence that the defendant was

under extreme mental or emotional disturbance when he committed the murder. The defendant's confession revealed that he was somewhat fearful of being apprehended for the burglary, however, that same confession also revealed that the defendant and his accomplice had nearly left the residence by way of the kitchen and then returned to the living room and bedroom where the killings took place.

"3. The evidence shows that the victims were completely unaware that the defendant and his accomplice were inside the residence when they arrived at their home. Thus, the victims were not participants in nor did they consent to the defendant's conduct.

"4. Juvenile proceedings have been instituted against the defendant's accomplice for his participation in these crimes. In his confession the defendant stated that he, the defendant, stabbed both of the victims. Thus, the defendant's participation in the murders was not minor.

"5. There was no evidence that the defendant was under substantial domination of another person.

"6. The defendant did not file a plea of insanity nor did he file a plea alleging lack of comprehension. In his confession the defendant stated that he had consumed a small quantity of controlled substances on the day of the murders and that he was high. The testimony of witnesses detailing the defendant's actions shortly after the killings show that his thinking was clear and was well aware of what had occurred. The evidence fails to substantiate that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired as a result of mental disease or defect or of intoxication.

"7. As to any other circumstances appropriate for consideration, the only other circumstance which might be considered is the defendant's age of 18 years.

> This is not necessarily to be considered as a mitigating circumstance, particularly in view of the obvious torture inflicted upon at least one of the victims prior to the final fatal blow. The capability of such cruelty in the mind of one that age cannot be considered a mitigating circumstance.
>
> "In conclusion the court finds beyond a reasonable doubt that the aggravating circumstances of the intentional killing of the victims while committing a burglary and the defendant having committed two murders outweigh the mitigating circumstance of no significant history of prior criminal conduct. Accordingly, the court finds the jury recommendation to be proper and lawful and that the court has a duty to follow such recommendation."

We have reviewed the written findings and reasons along with the evidence in the case and find that the record clearly supports the conclusion that the imposition of the death sentence was determined by the nature of the offense and the character of the offender. Two of the statutory aggravating circumstances were proved beyond a reasonable doubt and both the jury and the judge found that these aggravating circumstances outweighed the mitigating circumstance of no prior criminal history. We find that the trial court in all respects properly followed the required procedures in imposing the sentence of death. The evidence in the record supports our conclusion that the sentence of death was not arbitrarily or capriciously arrived at and is not manifestly unreasonable.

The judgment of the trial court is affirmed in all things; the cause is remanded to the trial court for the purpose of fixing a date for the death sentence to be carried out.

GIVAN, C.J., and PIVARNIK, J., concur.

DeBRULER, J., concurs and dissents with opinion in which PRENTICE, J., concurs.

DeBRULER, Justice, concurring and dissenting.

Operations required to be performed by the jury and judge after the conclusion of a death sentencing hearing are set forth in Ind.Code §35-50-2-9(e) which provides:

> "(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:
>
> (1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and
>
> (2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances. The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation."

According to this statute the "final determination of the sentence" is to be made by the judge by applying the same standards used by the jury in reaching its recommendation. The first standard to be applied by the judge is the trier-of-fact standard of proof beyond a reasonable doubt. One of the major goals of this sentencing process is to prevent the discriminatory and arbitrary imposition of the death penalty. *Brewer v. State*, (1982) Ind., 417 N.E.2d 889. This goal, under this statute, is in major part to be assured through the requirement that the judge, as trier of fact, be persuaded to a moral certainty beyond a reasonable doubt that an aggravating circumstance has been proven. In order to accomplish this essential operation, the judge must be in a trier-of-fact mindset and not a review or appellate mindset. *Schiro v. State*, (1983) Ind., 451 N.E.2d 1047, separate concurring and dissenting opinions of DeBruler, J., and Prentice, J. Without appellate enforcement of this requirement, the death judgment will be based upon an advisory jury verdict which is reviewed for sufficiency of

the evidence by the sentencing judge. That is no judgment at all. That would be totally at odds with the purpose of the layered statutory scheme to prevent the arbitrary and discriminatory imposition of the death penalty.

The finding and judgment of the sentencing court below is as follows:

> "The Court now enters finding and reasons for the imposition of the death penalty as recommended by the jury in this case as follows:
>
> The defendant, Richard Dillon, was found guilty of the killings of William Hilborn and Mary Hilborn during the commission of a burglary in the guilt determination stage of the trial.
>
> At the sentencing hearing, the burden was upon the State of Indiana to prove beyond a reasonable doubt that the murders were intentional and committed during the perpetration of a burglary as set forth in Counts VII and VIII of the charging information. The State moved to incorporate by reference the testimony presented in the first stage of the trial, which motion was granted. The testimony showed that the defendant and another broke and entered the Hilborn residence with the intent to commit the felony of theft. While the defendant and his cohort were inside the residence in the process of committing the burglary, William and Mary Hilborn returned to their home. The defendant and his accomplice, while in hiding inside the house, determined that it would be necessary to kill both William and Mary Hilborn in order to escape criminal prosecution and then carried out that plan. Accordingly, the jury was justified in finding beyond a reasonable doubt the existence of the aggravating circumstances of an intentional killing of the victims while committing a burglary and that the defendant committed another murder.
>
> In reviewing the seven possible mitigating circumstances considered by the jury, the Court finds:

1. The defendant had no significant history of prior criminal conduct. This is a mitigating circumstance which must be weighed against the aggravating circumstances.

2. There was no evidence that the defendant was under extreme mental or emotional disturbance when he committed the murders. The defendant's confession revealed that he was somewhat fearful of being apprehended for the burglary, however, that same confession also revealed that the defendant and his accomplice had nearly left the residence by way of the kitchen and then returned to the living room and bedroom where the killings took place.

3. The evidence shows that the victims were completely unaware that the defendant and his accomplice were inside the residence when they arrived at their home. Thus, the victims were not participants in nor did they consent to the defendant's conduct.

4. Juvenile proceedings have been instituted against the defendant's accomplice for his participation in these crimes. In his confession the defendant stated that he, the defendant, stabbed both of the victims. Thus, the defendant's participation in the murders was not minor.

5. There was no evidence that the defendant was under substantial domination of another person.

6. The defendant did not file a plea of insanity nor did he file a plea alleging lack of comprehension. In his confession the defendant stated that he had consumed a small quantity of controlled substances on the day of the murders and that he was high. The testimony of witnesses detailing the defendant's actions shortly after the killings show that his thinking was clear and was well aware of what had occurred. The evidence fails to substantiate that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substan-

tially impaired as a result of mental disease or defect or of intoxication.

7. As to any other circumstances appropriate for consideration the only other circumstance which might be considered is the defendant's age of 18 years. This is not necessarily to be considered as a mitigating circumstance, particularly in view of the obvious torture inflicted upon at least one of the victims prior to the final fatal blow. The capability of such cruelty in the mind of one that age cannot be considered a mitigating circumstance.

In conclusion the court finds beyond a reasonable doubt that the aggravating circumstances of the intentional killing of the victims while committing a burglary and the defendant having committed two murders outweigh the mitigating circumstances of no significant history of prior criminal conduct. Accordingly, the court finds the jury recommendation to be proper and lawful and that the Court has a duty to follow such recommendation.

DATED: August 21, 1981.

Edward C. Theobald, Judge
Superior Court of Knox County"

There is no direct statement here that the sentencing judge was persuaded beyond a reasonable doubt that the defendant is guilty of felony murder and at the time of such offense intentionally killed one of the victims, the elements of the aggravating circumstance relied upon by the State. Ind.Code §35-50-2-9(b)(1). Instead, this record shows a review of the evidence supporting the existence of the aggravating circumstance. There is no dealing with that evidence as a trier of fact. It may be that this has occurred again because of the lack of precision in the language of the statute. *Cf. Schiro v. State, supra.* It may be because the trial and sentencing process in a capital case has become too complicated and demanding. Whatever the difficulty, this Court should stand firm and require a clear

demonstration that the essential operations of the death sentencing process have taken place. I find no such demonstration here, and therefore must vote to set aside the penalty of death. I do not, however, find legal or constitutional grounds for reversal and therefore vote to affirm the conviction.

PRENTICE, J., concurs.

STATE OF INDIANA

SS:

COUNTY OF KNOX

IN THE KNOX
SUPERIOR COURT
NOVEMBER, 1981

STATE OF INDIANA	)	
VS	)	CAUSE NO: SCR 81-17
RICHARD DILLON	)	

AFFIDAVIT

Comes now Jimmy Fulcher after first being duly sworn upon his oath, deposes and says:

1. That he is an attorney duly admitted to practice law in the State of Indiana and has his office in Petersburg, Pike County, Indiana.

2. That he was retained to represent the defendant herein, Richard Dillon in the above-captioned matter.

3. That prior to the trial he announced to the court that he was not competent to represent the defendant properly.

4. That prior to the trial he announced to the Court that he was suffering from problems due to a recent divorce with his wife, injuries of a brother and imminent death of his father.

5. That due to this he could not adequately prepare and did not adequately prepare for the trial of the defendant herein.

6. That because of this he represented to the Court that he would subject himself to whatever disciplinary action that would be taken by his client or court.

7. That in fact he reviewed the case with the defendant for less than four hours from the time of arrest to trial.

8. That the court continued with the trial after being aware of the above mentioned.

9. That the defendant's attorney feels a new trial should be granted due to his incompetency.

/s/ Jimmy Fulcher
JIMMY FULCHER

SUBSCRIBED AND SWORN to before me a Notary Public this 25th day of November, 1981.

/s/ Steven E. Ripstra
NOTARY PUBLIC

My Commission Expires:
1-31-83

INDIANA CODE SECTION 35-50-2-9

Death sentences.—(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one [1] of the aggravating circumstances listed in subsection (b) of this section. In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one [1] of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law-enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another muder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other muder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one [1] of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one [1] of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the Supreme Court. The review, which shall be heard under rules adopted by the Supreme Court, shall be given priority over all other cases. The death sentence may not be executed until the Supreme Court has completed its review. [IC 35-50-2-9, as added by Acts 1977, P.L. 340, §122, p. 1533.]